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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION

18 CANTER & ASSOCIATES, LLC, and
19 LAUREATE EDUCATION, INC.,

20 Plaintiffs,

21 v.
22

23 TEACHSCAPE, INC.,
24

25 Defendant.
26

27 Case No. C 07-3225 RS
28

**PLAINTIFFS CANTER &
ASSOCIATES, LLC'S, AND
LAUREATE EDUCATION, INC.'S
MEMORANDUM IN OPPOSITION
TO MOTION TO DISMISS AND/OR
STRIKE COMPLAINT**

Judge: The Honorable Richard Seeborg
Ctrm.: 4 (5th floor)
Date: September 26, 2007
Time: 9:30 a.m.

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INTRODUCTION

2 Defendant Teachscape, Inc. (“Teachscape”) has brought a meritless Motion to
3 Dismiss And/Or Strike Complaint (the “Motion”) by using a heightened standard for
4 pleading the claims asserted in contravention of the law, and by ignoring and contesting
5 many of the facts alleged in the Complaint for Injunctive Relief and Damages (the
6 “Complaint”) by Plaintiff Laureate, Inc. (“Laureate”) and its subsidiary, Plaintiff Canter &
7 Associates LLC (“Canter”). On a motion to dismiss for failure to state a claim, however,
8 Teachscape cannot ignore or deny the following, critical facts pled by Laureate and Canter:
9 (1) that many of Canter’s employees went to work for Teachscape; (2) that these employees
10 not only had access to, but in some instances developed, Laureate’s and Canter’s distance
11 learning degree programs; (3) that these employees also knew critical details about
12 (a) Canter’s contractual relationships with its partners, such as Marygrove College, to
13 implement these degree programs, (b) Canter’s research about the distance learning market,
14 and (c) Canter’s strategies for succeeding in that market; (4) that only after these employees
15 arrived at Teachscape, did it develop master’s degree programs and graduate courses similar
16 to Laureate’s and Canter’s; and (5) that Marygrove breached its agreement with Laureate
17 and Canter for their delivery of master’s degree programs, while at the same time
18 Teachscape announced through advertisements that it would begin offering the same
19 graduate degree program through Marygrove as “updated;” (6) that, when approached by
20 Laureate and Canter about its inducement of Marygrove’s breach, Teachscape withdrew the
21 graduate degree program with the exact same name as Canter’s, but also refused to provide
22 the course materials, with draft versions, of its programs so that they could determine
23 whether Laureate’s materials were used and copied by Teachscape. All of these facts must
24 be accepted as true. As such, Laureate and Canter’s claims that Teachscape copied
25 Laureate’s and Canter’s course offerings, misappropriated Canter’s confidential
26 information, intentionally interfered with Canter’s partner relationships, and engaged in
27 false advertising and unfair competition, are plausible under *Twombly*. Consequently, the
28 Complaint meets the federal rules’ notice pleading standard and the Motion must be denied.

STATEMENT OF FACTS

I. LAUREATE'S AND CANTER'S POSITION IN THE MARKETPLACE BEFORE TEACHSCAPE'S WRONGFUL CONDUCT.

4 Laureate is a market leader in the online graduate degree market. Compl. ¶ 6.
5 Canter, a Laureate subsidiary, provides distance-delivered master's degree programs—e.g.,
6 Master in the Art of Teaching, Master in Education, and Master of Science in Education—
7 and graduate courses in the field of education for teachers through partnerships with
8 accredited universities. *Id.* Canter has achieved and maintained its market leadership
9 position through extensive efforts to understand the specific needs of each of its partner
10 universities and the school teachers that enroll in its master's degree programs and graduate
11 level courses through those universities. *Id.* ¶¶ 6, 10 & 12. One example of this was the
12 creation of the Master in the Art of Teaching (“MAT”) with a focus on Curriculum,
13 Instruction and Assessment (“CIA”) degree program that came at great cost and effort to
14 Laureate and Canter. *Id.* ¶ 14.

15 A key part of Canter’s market research included gathering non-public information
16 regarding lucrative markets, as well as determinations regarding market segments that were
17 not profitable to pursue. *Id.* ¶ 10. Canter also developed specialized marketing methods for
18 increasing school teacher enrollment and profitability of its relationships with its partner
19 universities. These market research and development methods were summarized in highly
20 confidential “three-year plans” for the growth of Canter’s online degree business. *Id.*

21 In addition, Canter invested in research regarding targeting certain subject areas for
22 its online graduate degrees. *Id.* ¶ 13. Canter's research revealed that school teachers
23 enrolling in its programs needed courses targeting Reading, Literacy and Mathematics. *Id.*
24 Canter's market research and methodology for taking advantage of the state of the distance-
25 delivered teaching degree market was summarized in various highly confidential Corporate
26 Investment Proposals. *Id.* Based on these proposals, Laureate and Canter further invested
27 in the development of master's degrees in the areas of Reading and Math, including the
28 creation of video and written materials supporting degrees in these areas. *Id.* ¶¶ 13 & 24.

1 One of Laureate's and Canter's accredited university partners is Marygrove. *Id.*
 2 ¶ 15. As part of their longstanding relationship, Canter and Marygrove entered into a
 3 contract for the provision of the MAT degree in CIA. *Id.* As with Canter's partnerships
 4 generally, although the existence of this partnership is public, the terms of the contract with
 5 Marygrove are not publicly known and subject to confidentiality. *Id.*

6 **II. CANTER'S FORMER EMPLOYEES WORK FOR TEACHSCAPE USING
 7 CANTER'S TRADE SECRETS AND LAUREATE'S COPYRIGHTED
 COURSE MATERIALS.**

8 Starting April 2004, a group of employees left Canter and subsequently were
 9 employed by, or contracted with, Teachscape. *Id.* ¶ 7. These former employees had held
 10 various positions at Canter, from executive management to product development, including:
 11 (1) Vice President of the Distance Learning Masters Programs—Melissa Jaivin; (2) Vice
 12 President of Graduate Courses—Hae Young Kim; (3) Vice President of Business
 13 Development—Mike Soules; (4) Marketing Managers of the Distance Learning Masters
 14 Program—Valerie Cameron and Anna Crupi; (5) Program Specialist in Product
 15 Development—Barbara DeHart; and (6) Director of Editorial Service—Brenda Pope-
 16 Ostrow. *Id.* Each of these individuals played a key role at Canter and, depending on their
 17 position, these persons were instrumental in, among other things: (1) performing the market
 18 research summarized in the highly confidential three-year plans and the Corporate
 19 Investment Proposals; (2) negotiating the confidential terms of the contract with
 20 Marygrove; (3) identifying and cultivating relationships with university partners like
 21 Marygrove; (4) marketing Canter's products to university partners and to potential students;
 22 (5) developing master's degree programs in CIA, Reading, and Math. *Id.* ¶ 8. These former
 23 employees signed confidentiality agreements upon commencing work with Canter, and thus
 24 were obligated to keep the confidentiality of the various non-public aspects of Canter's
 25 business. *Id.* ¶ 23.

26 As evidenced by Teachscape's dealings with Marygrove after these persons joined
 27 Teachscape, these persons' knowledge of and familiarity with Laureate's and Canter's
 28 confidential market research, highly confidential strategic business plans and proposals, and

1 course materials for the existing CIA and new Math and Reading programs, enabled
 2 Teachscape to rapidly penetrate the market in master's degree and graduate course
 3 programs, in which it had no prior standing. *Id.* ¶¶ 13-15. Teachscape was able to focus
 4 only on the partnerships, course offerings, and programs that were profitable for Canter,
 5 thereby avoiding the waste of time and resources on markets and programs that, through
 6 years of research and analysis, Canter had already learned were not profitable. *Id.* ¶ 11. It
 7 took Canter years to establish its prominence in the marketplace, knowledge of that market
 8 and customer relationships in the master's degree and graduate course areas, and to develop
 9 and fine-tune its course materials. By contrast, Teachscape was able to effectively
 10 undermine Canter by marketing directly to Canter's profitable partners with similar, if not
 11 identical, program and course offerings and market expertise in a relatively short time after
 12 the first former Canter employee joined it. *Id.* ¶¶ 9, 11 & 15-16. Based on this and other
 13 information, Laureate and Canter believe that Teachscape used Laureate's copyrighted
 14 course materials without permission, and used Canter's confidential information even
 15 though it knew that these former employees had a continuing duty of confidentiality
 16 towards Canter because it was so advised by Laureate and Canter. *Id.* ¶¶ 23 & 25.

17 **III. TEACHSCAPE INTERFERES WITH CANTER'S LONGSTANDING**
 18 **RELATIONSHIP WITH MARYGROVE.**

19 Teachscape's entry into the master's degree market was premised on disrupting
 20 Canter's long-term university partnerships. *Id.* ¶ 9. The programs Teachscape offered were
 21 in the same focus areas as those offered by Canter. *Id.* ¶ 11. One example is Teachscape's
 22 attempt to supplant Canter in delivering those programs for Marygrove and to the school
 23 teachers enrolling in Canter's master's degrees through Marygrove. Only after employing
 24 Canter's former employees, Teachscape announced and advertised its intention to offer a
 25 graduate level course through Marygrove. *Id.* ¶ 14. Then, in or around September 2006,
 26 Teachscape also announced and advertised a MAT degree in CIA through Marygrove
 27 scheduled to begin in early 2007 even though Canter was, at that time, offering the same
 28 MAT degree with the same focus in CIA. *Id.* ¶¶ 14, 17 & 20. Even though it had never

1 previously offered any such program, Teachscape marketed it as:

2 **Master in the Art of Teaching with a Focus on Curriculum, Instruction &**
Assessment (updated)

4 *Id.* ¶ 18. Teachscape also announced that it would offer masters degrees in Math and
5 Reading through a partnership with Marygrove beginning in 2007. *Id.* ¶ 16.

6 All of these offerings by Teachscape were in direct contravention of the contract
7 between Canter and Marygrove. *Id.* ¶¶ 16-17. First, the contract specified that the MAT
8 degree in CIA would be supplied to Marygrove exclusively by Canter during its term. *Id.*
9 ¶ 17. Melissa Jaivin and perhaps others among Canter's former employees were fully
10 aware of this as a result of their employment with Canter. *Id.* Second, the contract
11 provided Canter a right of first refusal for any further MAT degree offerings on the same
12 terms that Marygrove would offer to a third party. *Id.* ¶ 16. Again, at least one of Canter's
13 former employees was aware of this contractual term. *Id.* Despite these terms, Teachscape
14 and Canter's former employees misused their knowledge of other confidential terms in the
15 Marygrove contract to negotiate with Marygrove and to supplant Canter. *Id.* ¶ 15. Canter
16 has information to believe that Teachscape has engaged in similar conduct with respect to
17 Canter's other profitable university partnerships. *Id.* ¶ 22.

18 **IV. TEACHSCAPE DENIES ITS INTERFERENCE WAS INTENTIONAL AND**
REFUSES TO TURN OVER DRAFTS OF ITS COURSE MATERIALS
WHEN LAUREATE AND CANTER INVESTIGATE ITS CONDUCT.

20 Once they were alerted to Teachscape's interference with Canter's contract with
21 Marygrove, Laureate and Canter contacted both Teachscape and Marygrove and inquired
22 about the degree offerings Teachscape intended to launch through Marygrove in early 2007.
23 *Id.* ¶ 20. Marygrove denied the existence of any relationship between itself and
24 Teachscape. *Id.* Marygrove further stated that it had no knowledge of any degree offerings
25 by Teachscape that would be launched through it in 2007. *Id.* Teachscape, on the other
26 hand, could not deny the relationship because it already had advertised these degree
27 offerings. Instead, Teachscape claimed that it was unaware that its intended degree
28 offerings through Marygrove in any way interfered with any contractual obligations

1 between Canter and Marygrove, despite the fact that certain of Teachscape's key employees
 2 involved in the Marygrove transaction also had negotiated the Marygrove-Canter contract at
 3 issue while at Canter. *Id.* Despite its denial of any wrongdoing, Teachscape thereafter
 4 withdrew its offering of the MAT degree in CIA program for the year 2007, implicitly
 5 acknowledging that this offering was a breach of the Marygrove-Canter contract. *Id.* ¶ 21.

6 Also as part of their investigation, Laureate and Canter sought an "inspection of all
 7 course-related materials, *including drafts thereof*, that [Teachscape] intend[ed] to use in
 8 connection with its degree program offerings with Marygrove." Decl. of Gayle M.
 9 Athanacio in Supp. of Def.'s Mot. to Dismiss / Strike Compl. ("Athanacio Decl.") Ex. A,
 10 at 3 (emphasis added). Teachscape's counsel initially rebuffed the request completely, and
 11 then conditioned providing any course materials on Laureate and Canter specifying a slew
 12 of information regarding Laureate's copyrighted materials in addition to providing those
 13 materials in exchange. *Id.* Ex. B, at 2; *id.* Ex. C, at 3. Those onerous and unnecessary
 14 terms aside, Teachscape refused to provide the drafts as requested. *Id.* Ex. C, at 3. A
 15 second request for these materials was rebuffed, again, with only a counteroffer to exchange
 16 final course materials. *Id.* Ex. D, at 2; *id.* Ex. E, at 1. Thus Teachscape repeatedly imposed
 17 unreasonable terms on Laureate's access to final materials, which were already in the hands
 18 of teachers enrolled in Teachscape's programs and courses through Marygrove. More
 19 importantly, Teachscape absolutely refused to provide drafts of its materials, in which any
 20 evidence of direct copying likely existed, so as to prevent Laureate from evaluating its
 21 copyright claim. *See* Compl. ¶ 26.

22 In light of the circumstances and armed with the facts of Teachscape's knowing
 23 interference, misuse of Canter confidential information, and refusal to provide course
 24 materials for evaluation on reasonable terms, Laureate and Canter filed suit. In response,
 25 Teachscape filed this Motion that denies wrongdoing by trying to explain away the facts
 26 Laureate and Canter have presented, with the goal of shielding other facts from discovery
 27 by bringing this suit to a premature conclusion.

28

ARGUMENT

I. TEACHSCAPE MISREADS THE STANDARD IN TWOMBLY AS REQUIRING MORE THAN NOTICE PLEADING.

The Court should reject the “Legal Standard” in Teachscape’s Motion because it is an attempt to heighten the pleading requirements beyond those promulgated by Rule 8 and the cases applying it. Tellingly, Teachscape omits the very beginning of the holding in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (“*Twombly*”), in which the United States Supreme Court confirmed that:

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,” *Conley v. Gibson*

Id. at 1959. In accord with its misreading of *Twombly*, Teachscape’s Motion seeks specific facts supporting each and every element of Laureate’s and Canter’s claims. As confirmed by the United States Supreme Court, however, “[s]pecific facts are not necessary.” *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citing to *Twombly*). In analyzing whether *Twombly* did more than change the pleading requirement for the antitrust claim being litigated in that case, the Second Circuit stated:

[T]he Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible “plausibility standard,” which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.

Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007).

Thus, *Twombly* does not enable a defendant, like Teachscape, to demand the pleading of specific facts that it ultimately contests to avoid liability. As explained below, Laureate and Canter have pled facts that both render their claims plausible and provide Teachscape with notice of their basis, which is just what *Twombly* requires.

1 **II. LAUREATE'S COPYRIGHT INFRINGEMENT CLAIM IS PROPERLY
2 PLED IN LIGHT OF THE FACTS AND CIRCUMSTANCES ALLEGED.**

3 **A. The Court Should Reject Teachscape's Attempt to Shield Itself From
4 Copyright Liability By Refusing Access To Its Infringing Materials.**

5 **1. Laureate has pled copyright infringement per the requirements of
6 the Ninth Circuit.**

7 Laureate should be able to proceed with their claim of copyright infringement on the
8 facts pled. The elements of a copyright infringement claim are: (1) ownership of a valid
9 copyright, and (2) copying of constituent elements of the work that are original. *Fiest
10 Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282 (1991). In the
11 Ninth Circuit, it is sufficient that a complaint alleges ownership and infringement of
12 copyrights, and seeks relief under the Copyright Act. *See Kelly v. Arriba Soft Corp.*, 336
13 F.3d 811, 817 (9th Cir. 2003); *Columbia Pictures Tel. v. Krypton Broad. of Birmingham,
14 Inc.*, 106 F.3d 284, 288 (9th Cir. 1997), *rev'd on other grounds sub nom. Feltner v.
15 Columbia Pictures Tel., Inc.*, 523 U.S. 340, 118 S. Ct. 1279 (1998); *Effects Assocs., Inc. v.
16 Cohen*, 817 F.2d 72, 73 (9th Cir. 1987). As stated by one court in this Circuit:

17 Copyright claims need not be pled with particularity, and complaints which
18 allege present copyright ownership by the plaintiff, proper registration, and
19 infringement by defendant have been held sufficient. *Perfect 10, Inc. v.
20 Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1120 (C.D. Cal. 2001).
21 Plaintiffs are not required to specify each and every instance of infringement.
22 *Id.* Therefore, Plaintiffs need not, as Defendants would suggest, identify the
23 times, similarities, or other details of the alleged infringements in their
24 pleadings.

25 *Marvel Enters., Inc. v. NCSoft Corp.*, No. 04-9253, 2005 WL 878090, at *1 (C.D. Cal. Mar.
26 9, 2005); *see also Elektra Entm't Group v. Avery*, No. 06-2541, 2007 WL 2023545, *1
27 (E.D. Cal. July 11, 2007); *accord* Fed. R. Civ. P. 84 & Appx. of Forms No. 17 (Compl. for
28 Infringem't of Copyright and Unfair Comp.).

29 In keeping with the requirements of the Federal Rules and the Ninth Circuit,
30 Laureate has alleged ownership of its copyrights in its AudioVisual and Online Course
31 Materials that have been duly registered. *See* Compl. ¶ 24. In addition, Laureate has
32 alleged, based on the facts set forth in its Complaint, that "at least as of January 2007,

1 Teachscape has deliberately and willfully infringed Laureate's copyrights in the
 2 AudioVisual and Online Course Materials by making copies and derivative works
 3 therefrom." *Id.* ¶ 84. This is all that is needed to allege copyright infringement.

4 **2. The claim of infringement is plausible given the facts alleged.**

5 Teachscape complains that Laureate's allegation of infringement "is not supported
 6 by any *facts* describing any allegedly infringing act by Teachscape whatsoever." Mot., at
 7 8:27-28. However, Teachscape's refusal to provide the basis for alleging specific facts of
 8 copying—i.e., drafts and final copies of its materials so that Laureate can allege substantial
 9 similarity between its works and Teachscape's materials—does not warrant ignoring all the
 10 other facts pled in support of this allegation, and does not render it wholly conclusory. As
 11 with other claims, the "flexible plausibility standard" set forth in *Twombly* applies. *See U2*
 12 *Home Entm't, Inc. v. Kylin TV, Inc.*, No. 06-2770, 2007 WL 2028108, at *5 (E.D.N.Y. July
 13 11, 2007) (applying *Twombly* and *Iqbal, supra* to motion to dismiss copyright claim).

14 In this case, Laureate's copyright infringement claim is plausible in light of the facts
 15 alleged. Teachscape hired twelve former employees of Canter, some of whom developed
 16 and edited Laureate's and Canter's AudioVisual and Online Course Materials, and all of
 17 whom had access to them. *See* Compl. ¶¶ 7-8. These AudioVisual and Online Course
 18 Materials are for master's degrees and graduate level courses in the field of teaching. *See*
 19 *id.* ¶ 24. Within months of these former employees of Canter joining it, Teachscape began
 20 to offer, for the first time, graduate level courses and then master's degree programs in the
 21 field of teaching. *See id.* ¶¶ 9 & 11. Specifically, Teachscape offered master's degrees,
 22 with focuses in (1) Reading and Literacy, (2) Mathematics, and (3) CIA, all three of which
 23 on their face are similar to offerings through Laureate's copyrighted AudioVisual and
 24 Online Course Materials. *See id.* ¶¶ 13 & 24. Indeed, as to the MAT degree in CIA,
 25 Teachscape marketed its degree offering as "updated," implying that it is a newer version of
 26 the same offering by Canter through its partner, Marygrove. *See id.* ¶¶ 17-18. Finally,
 27 before filing the Complaint, Laureate and Canter sought to review Teachscape's materials
 28 used in connection with its master's degree programs, including all drafts and final product,

1 to determine whether there was substantial similarity with Laureate's materials. *See id.*
 2 ¶ 26. Teachscape refused, thus raising the likelihood of infringement, and supporting a
 3 more-than-plausible assertion of infringement in light of the circumstances. *See id.* In sum,
 4 there was enough smoke for Laureate to allege there's a fire.

5 **3. Teachscape's refusal to produce drafts of its materials should not**
 6 **serve as a basis to dismiss Laureate's infringement claim.**

7 Teachscape should not be allowed to hide behind its refusal to provide drafts of its
 8 materials, while trumpeting its offering of final course materials on unreasonable terms, so
 9 as to avoid a charge of infringement. Teachscape's statement that it "was willing to engage
 10 in an exchange of *any allegedly infringing material*" is belied by their offer of only "*final*
 11 course materials." Mot., at 9:13-16 (emphasis added). Laureate's repeated requests for
 12 drafts of these materials and Teachscape's refusal to provide them is not trivial. *See* Compl.
 13 ¶ 26. It goes to the heart of the dispute between the parties. Laureate's rights extend to any
 14 copies made of its work by Teachscape and its employees and contractors, including copies
 15 that are drafts, intermediate, or transitory versions of Teachscape's final course materials, as
 16 long as those copies are in a fixed medium. *See* 17 U.S.C. §§ 106 & 501(a); *Sega Enters.*
 17 *Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1518 (9th Cir. 1992) ("the Copyright Act does not
 18 distinguish between unauthorized copies of a copyrighted work on the basis of what stage of
 19 the alleged infringer's work the unauthorized copies represent."); *Walker v. Univ. Books,*
 20 *Inc.*, 602 F.2d 859, 863-64 (9th Cir. 1979); *Walt Disney Prods. v. Filmation Assocs.*, 628
 21 F. Supp. 871, 875-76 (C.D. Cal. 1986); 2 Melville B. Nimmer & David Nimmer, Nimmer
 22 on Copyright § 8.02C (Matthew Bender: 2006). Any such infringement and then further
 23 derivation of final works therefrom entitles Laureate to damages, injunctive relief, and the
 24 impounding of those derivative works. *See* 17 U.S.C. §§ 106 & 502-04.

25 That Laureate cannot point specifically to the substantial similarity between each of
 26 its copyrighted materials and each of Teachscape's materials, because Teachscape refused
 27 access to all its materials, should not preclude this case from proceeding so that the
 28 materials are obtained in discovery. "All pleadings shall be so construed as to do

1 substantial justice.” Fed. R. Civ. P. 8(f). The cases cited in the Complaint stand for the
 2 proposition that because the infringing act or physical subject matter was not ascertainable
 3 by the intellectual property holder, other circumstances made the assertion of infringement
 4 reasonable. *See Intamin, Ltd. v. Magnetar Techs. Corp.*, 483 F.3d 1328, 1338 (Fed. Cir.
 5 2007); *Hoffman-LaRoche Inc. v. Invamed Inc.*, 213 F.3d 1359, 1363-64 (Fed. Cir. 2000).
 6 Contrary to Teachscape’s assertion, this doctrine should apply as much to copyright
 7 infringement as it does to patent, such that an infringer cannot shield itself from liability by
 8 keeping its infringement hidden or because it is out of plain view. Otherwise, intellectual
 9 property holders would be put in the precarious position of using pretext or otherwise
 10 engaging in violations of other laws to capture an infringer’s hidden transgressions.¹

11 **B. Laureate’s Registration Of Derivatives of Its Copyrighted Works Is**
 12 **Sufficient Because It is The Owner Of The Original Works Contained**
 13 **Therein.**

14 Teachscape omits the applicable law in arguing that Laureate has not complied with
 15 the requirement of copyright registration before filing suit in 17 U.S.C. § 411(a) because its
 16 registrations are for derivative works. *See Mot.*, at 11:20-12:13. As held by the Second
 17 Circuit and other courts:

18 because [plaintiff] is the owner of the copyright of both the derivative and
 19 pre-existing work, the registration certificate relating to the derivative work in
 20 this circumstance will suffice to permit it to maintain an action for
 infringement based on defendants’ infringement of the pre-existing work.
 That plaintiff need not produce a separate registration relating to the
 pre-existing work is a proposition which finds support in other courts and in
 the writings of scholarly commentators.

21 *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 747 (2d Cir. 1998); *see also Xoom,*
 22 *Inc. v. Imageline, Inc.*, 323 F.3d 279, 283-84 (4th Cir. 2003); *In re Indep. Serv. Orgs.*
 23 *Antitrust Litig.*, 964 F. Supp. 1469, 1473-74 (D. Kan. 1997); *Greenwich Film Prods., S.A. v.*
 24 *DRG Records, Inc.*, 833 F. Supp. 248, 250-51 (S.D.N.Y. 1993); *Computer Assocs. Int’l, Inc.*

25 ¹ Teachscape’s attempt to weave-in an argument that Laureate’s copyright infringement
 26 claim does not meet the requirements of Rule 11 is improper because it should not be
 27 presented as part of a Rule 12 motion to dismiss. *See Fed. R. Civ. P. 11(c)(1)(A)*. Nor does
 28 Laureate’s indication in the Complaint that it is in compliance with Rule 11, and cases cited
 in support thereof, somehow make the issue the proper subject for a motion to dismiss.

1 *v. Altai, Inc.*, 775 F. Supp. 544, 555-57 (E.D.N.Y. 1991), *aff'd in part and vacated in part*
 2 *on other grounds*, 982 F.2d 693 (2d Cir. 1992); 2 Nimmer on Copyright § 7.16[B][2][c].

3 The case cited by Teachscape is inapposite. It holds that a registration of a derivative
 4 work is insufficient when the plaintiff is not the owner of the underlying work. *See*
 5 *Silverman v. CBS, Inc.*, 870 F.2d 40, 49-50 (2d Cir. 1989). In this case, however, Laureate
 6 is the owner of the original and derivative works subject to the registrations at issue. *See*
 7 Compl. ¶ 24. Thus, Teachscape's argument fails as a matter of law.

8 **III. LAUREATE'S AND CANTER'S COMPLAINT MORE THAN MEETS THE
 9 REQUIREMENT OF A SHORT AND PLAIN STATEMENT GIVING
 TEACHSCAPE NOTICE OF THEIR CLAIMS.**

10 **A. Canter's Trade Secret Misappropriation Claim Is Adequately Pled.**

11 **1. Trade secrets should not be specified in a public complaint.**

12 Teachscape's attempt to require Canter to plead extensive details about the
 13 "boundaries" of its market research analysis, or the specifics of its course designs, is
 14 inappropriate. Obviously, doing so in the public pleading would endanger the
 15 confidentiality of those secrets. Even under the state court "heightened pleading" standard,
 16 a plaintiff alleging trade secret theft "does not have to spell out the details of the trade secret
 17 to avoid a demurrer to a complaint. To so require would mean that the complainant would
 18 have to destroy the very thing for which he sought protection by making public the secret
 19 itself." *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 252 (1968). Of course, Canter later
 20 will provide, as part of the discovery process and pursuant to a protective order, a detailed
 21 description of trade secret information before discovery regarding the misappropriation
 22 begins. *See* Cal. Civ. Proc. Code § 2019.210. This Court has noted that the Section
 23 2019.210 disclosure, while "not itself a pleading . . . functions like one in a trade secret
 24 case because it limits the scope of discovery in much the same way as the allegations of a
 25 complaint limit discovery in other types of civil actions." *Advante Int'l Corp. v. Mintel*
 26 *Learning Tech.*, No. 05-1022, 2006 WL 3371576, at *3 (N.D. Cal. Nov. 21 2006); *accord*
 27 *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1453 (2002). Thus, Teachscape's
 28 demand for additional details about Laureate's and Canter's trade secrets is, at best,

1 premature at the pleadings stage.

2 **2. Canter sufficiently provided notice of its trade secrets.**

3 Teachscape correctly notes that Canter must plead that it “owned a trade secret” and
 4 that Teachscape “acquired, disclosed, or used” this secret “through improper means.” Mot.,
 5 at 16:18-20. Canter has done so. A trade secret is defined broadly as “formula, pattern,
 6 compilation, program, device, method, technique, or process” which is valuable in part
 7 because it is not generally known, when efforts have been made to maintain its
 8 confidentiality. Cal. Civ. Code § 3426.1(d). The standard for pleading trade secrets is the
 9 same as for any non-fraud claim under the Federal rules: “‘fair notice of the claim and the
 10 grounds upon which it rests.’” *Mintel Learning Tech., Inc. v. Beijing Kaidi Educ. & Tech.*
 11 *Dev. Co.*, No. 06-7541, 2007 WL 2288329, at *2 (N.D. Cal. Aug. 9, 2007).

12 The Complaint states that Canter’s trade secret information included: (1) Canter’s
 13 three-year strategic plans; (2) the Corporate Investment Proposals regarding master’s
 14 degrees in Reading, Literacy and Math; (3) the particular requirements and preferences of
 15 each of its accredited university partners; and (4) the confidential details about the
 16 agreement and relationships between Canter and their partners, such as Marygrove. *See*
 17 Compl. ¶¶ 10-14, 17 & 28-37. Thus, Canter has adequately alleged trade secret information
 18 here. *See Mintel*, 2007 WL 2288329 at *6-*7 (finding allegations of trade secrets as source
 19 code, a database, and sound files, maintained with confidentiality through firewall and
 20 password, as adequately pled); *accord Telemasters Inc. v. Vintage Club Masters Ass’n*,
 21 No. 05-5139, 2006 WL 4599670, at *4-*5 (C.D. Cal. Jan. 9, 2006) (holding that complaint
 22 referring to “‘specialized knowledge and expertise and the development of unique plans,
 23 procedures and processes, including but not limited to computer programs and routines’”
 24 sufficiently alleged trade secrets under the state court heightened pleading standard); *accord*
 25 *Whyte*, 101 Cal. App. 4th at 1452-53 (holding, in the context of an appeal of the grant of a
 26 TRO, that pleadings descriptions such as “[Plaintiff’s] market research data” and
 27 “[Plaintiff’s] 1, 3 and 5 year strategic plan documents” were sufficiently detailed under the
 28 heightened state court pleading standard). Finally, the Complaint details that Canter has

1 made substantial efforts to keep this information confidential, including having its former
 2 employees sign confidentiality agreements, and notifying Teachscape of these
 3 confidentiality obligations soon after the former employees joined Teachscape. *See* Compl.
 4 ¶23. Canter has thus met all the requirements for pleading that it possesses trade secrets.
 5 *See Mintel*, 2007 WL 2288329 at *6-*7.

6 **3. Teachscape mischaracterizes Canter's trade secrets.**

7 In addition to arguing that more particularity is needed, Teachscape further
 8 misconstrues the trade secrets alleged as public information not subject to trade secret
 9 protection. *See* Mot., at 18:13-19:14. It does this, in part, by misstating the law by
 10 selectively quoting *Whyte* to argue that market research—i.e., knowledge of particular
 11 customers' needs—is not subject to trade secret protection because a buyer “is presumably
 12 aware of its own needs.” Mot., at 17:7-8. However, the holding in *Whyte* was more
 13 limited—it found that trade secret protection was inappropriate for the plaintiff’s knowledge
 14 “relat[ing] to a *single prominent buyer* that is presumably aware of its own needs.”²
 15 *Whyte*, 101 Cal. App. 4th at 1456 (emphasis added and citation omitted). Teachscape then
 16 misstates the facts by arguing that Canter is alleging trade secrets in the very existence of its
 17 partner relationships or “customer contacts” in order to analogize this case to ones where
 18 courts did not find secrets to lie in publicly available information. *See* Mot., at 18:22-19:3.
 19 In actuality, Canter alleges that the confidential nature of its dealings with its partners, its
 20 knowledge of the particular requirements and preferences of each of its many partners, its
 21 specific market strategies in working with these partners, and its profitability in its dealings
 22 with these partners, are secrets. *See* Compl. ¶¶ 12 & 15.²

23

24 ² Teachscape’s unfounded assertion, and request for judicial notice in support, that that no
 25 trade secret lies because “Canter is abandoning all ‘partners’ for online degree programs,”
 26 should be rejected as an improper (and factually unsupported) assertion to contest the truth
 27 of Plaintiffs’ allegations. Teachscape itself acknowledges that Canter’ web sites show
 28 master’s degree and graduate course programs through the University of New England,
 Olivet Nazarene University, and Marygrove, and these sites in no way indicate that any
 partners are being “abandoned.” *Compare* Mot. at 19:8-10 with *id.* at 18 n.6.

1 In addition to its weak attempt to devalue the very specialized and confidential
 2 knowledge of Canter's partners that it misused, Teachscape's professed failure to
 3 understand the plain explanation of the market at issue, and Canter's trade secrets with
 4 respect to the same, is just as easily rectified. The Complaint explains that the market for
 5 which Teachscape has misused Canter's trade secrets to compete is "distance-delivered
 6 master's degree programs and graduate courses for teachers . . ." Compl. ¶ 9. The market
 7 is not simply "universities, 'education partners' which can offer degrees" as Teachscape
 8 suggests despite having notice (and knowing) otherwise. *See Mot.*, at 18:13-21. As
 9 explained in the Complaint, "Canter invested years of market research and substantial
 10 resources into an analysis of the educational marketplace" and further elaborates about the
 11 nature of that investment, and how Teachscape misused that knowledge, taking it from the
 12 hands of Canter's former employees. *See Compl.* ¶¶ 10-11. Under the appropriate inquiry
 13 here, Teachscape's attempt to undermine Canter's factual allegations about the nature of its
 14 trade secrets should be rejected as both improper and ineffective, because those factual
 15 allegations must be taken as true. *See Twombly*, 127 S. Ct. at 1965 ("all the [factual]
 16 allegations in the complaint are true (even if doubtful in fact)").

17 **4. Canter sufficiently alleges Teachscape's misuse of trade secrets.**

18 The Complaint also adequately pleads the misappropriation of these secrets.
 19 Misappropriation is the wrongful acquisition or use of trade secrets. *See Cal. Civ. Code*
 20 § 3426.1(b). The Complaint points out the specific individuals who were exposed to
 21 confidential information relating to Canter's relationship with Marygrove, and who joined
 22 Teachscape shortly before it began offering graduate courses and master's degrees in the
 23 same focus areas identified as "growth areas" by Canter, through Marygrove. *See Compl.*
 24 ¶¶ 7-10. Canter likewise alleges that its former employees and Teachscape used Canter's
 25 trade secrets, including information about the Marygrove contract, in order to negotiate with
 26 Marygrove "on more favorable terms" than those in the contract. *Id.* ¶ 15. Canter further
 27 alleges that its former employees and Teachscape used trade secret information to create
 28 master's degrees in CIA, Reading, and Math, which Teachscape began to offer through

1 Marygrove. *Id.* ¶¶ 14-15. These facts more than adequately plead that Canter's former
 2 employees and Teachscape have misused Canter's trade secrets. *See Mintel*, 2007 WL
 3 2288329 at *6 (holding that allegations of trade secret use for the benefit of a competing
 4 company adequately pled trade secret misappropriation).

5 **5. Plaintiff's legal authority is inapposite.**

6 Teachscape relies upon a number California state court cases to argue that Canter has
 7 not pled sufficient facts. *See Mot.*, at 16:23-20:15 (citing to *Diodes*, 260 Cal. App. 2d 244,
 8 (1968); *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443 (2002); *Rigging Int'l Maint. Co.*
 9 *v. Gwin*, 128 Cal. App. 3d 594 (1982)). Only one of these cases addresses a pleading
 10 standard at all, and in doing so interprets the state court pleading standard, not the standard
 11 required by the Federal Rules. As even Teachscape's cited authority notes, “[t]he federal
 12 cases since the adoption of the federal rules are not helpful on the pleading questions in an
 13 action brought in a state court in California, because federal cases use ‘notice pleading,’
 14 whereas California uses ‘fact pleading.’” *Diodes*, 260 Cal. App. 2d at 250. For the same
 15 reason, Teachscape's citation to California cases applying state court pleading standards is
 16 not helpful.

17 In addition, Teachscape relies on federal authority that does not touch on the
 18 adequacy of the complaint, but on the merits of whether the trade secrets alleged were in
 19 fact trade secrets or were misappropriated. *See Hollingsworth Solderless Terminal Co. v.*
 20 *Turley*, 622 F.2d 1324, 1327 (9th Cir. 1980) (review of motion for summary judgment and
 21 preliminary injunction); *Posdata Co. v. Kim*, No. 07-2504, 2007 WL 1848661, at *3-*4
 22 (N.D. Cal. Jun. 27, 2007) (motion for temporary restraining order); *AdvantaCare Health*
 23 *Partners v. Access IV, Inc.*, No. 03-4496, 2003 WL 23883596, at *1-*2 (N.D. Cal. Oct. 24,
 24 2003) (motion for preliminary injunction); *Bayer Corp. v. Roche Molecular Sys.*, 72
 25 F. Supp. 2d 1111, 1112 (N.D. Cal. 1999) (motion for preliminary injunction); *Scott v.*
 26 *Snelling & Snelling, Inc.*, 732 F. Supp. 1034, 1037 (N.D. Cal. 1990) (motion for summary
 27 judgment). Reliance on these cases is not only inappropriate, but reveals that Teachscape's
 28 motion is really a premature summary judgment motion and not one directed to whether the

1 claim is plausible. *See* Mot., at 16:10-17, 19:20-25 & 20:1-13.

2 Teachscape cites only one case where a federal court dismissed a claim of trade
 3 secret misappropriation at the pleading stage. *See Globespan, Inc. v. O'Neill*, 151 F. Supp.
 4 2d 1229, 1235-36 (C.D. Cal. 2001). But in *Globespan*, the plaintiff failed to allege that the
 5 defendants had actually used any of its trade secrets; rather, plaintiff alleged that, due to the
 6 nature of its secrets and the former employee's new job, its trade secrets would inevitably
 7 be disclosed by the departing employee. *See id.* Here, Canter did not file a claim of trade
 8 secret misappropriation by asserting "inevitable disclosure" when twelve of its key former
 9 employees left for Teachscape starting in April 2004. Instead, Canter asserted its claim
 10 once it found that Teachscape actually was using its trade secret information known to those
 11 former employees. Consequently, Canter has alleged the trade secrets actually at issue and
 12 has alleged how they were misused. *See* Compl. ¶¶ 8-15. That a misappropriation claim
 13 may not be premised on inevitable disclosure does not prevent a plaintiff from alleging and
 14 then proving actual misappropriation to obtain relief. *See Whyte*, 101 Cal. App. 4th at 1458.

15 **B. Canter's Claims For Unlawful Interference Are Adequately Pled.**

16 Laureate and Canter have pled facts showing that: (1) Teachscape acted intentionally
 17 to disrupt Canter's relationship with Marygrove, including an existing transaction regarding
 18 the provision of a MAT degree in CIA and prospective transactions with degrees in Reading
 19 and Math; (2) the relationship with Marygrove was in fact disrupted by Teachscape seeking
 20 to take over the degree in CIA and offering Reading degrees in place of Canter; and
 21 (3) Canter has suffered damages as a result because its longstanding and profitable
 22 relationship with Marygrove has been damaged. *See* Compl. ¶¶ 15-17, 60. Canter need not
 23 do more to successfully state a claim for intentional interference with contract. *See Silicon*
 24 *Image, Inc. v. Analogix Semiconductor, Inc.*, No. 07-0635, 2007 WL 1455903, at *4 (N.D.
 25 Cal. May 16, 2007); *see also Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134,
 26 1159 (2003).

27 **1. Teachscape cannot feign ignorance to contradict the Complaint.**

28 Teachscape argues that because it did not know about the Marygrove contract when

1 confronted by Laureate and Canter, no knowledge of the Marygrove contract has been pled.
 2 *See Mot.*, at 22:11-23. This contradiction of Canter's factual assertion that Teachscape had
 3 knowledge is not appropriate. *See Twombly*, 127 S. Ct. at 1965 ("all the [factual]
 4 allegations in the complaint are true (even if doubtful in fact)"). Moreover, Canter's factual
 5 allegation as to Teachscape's knowledge may be averred to generally, and it is plausible
 6 because knowledge of a contract may be inferred from other facts being pled. *See Fed. R.*
 7 *Civ. P. 9(b)* ("knowledge . . . may be averred generally."); *Silicon Image*, 2007 WL
 8 1455903, at *4 (holding that knowledge of contract may be inferred from other facts, such
 9 as general knowledge in the industry). Here, Canter has alleged that: (1) at least Melissa
 10 Jaivin—one of Canter's former employees who is now Teachscape's Vice President of
 11 Higher Learning—had knowledge of Canter's contract with Marygrove because, among
 12 other things, she participated in its negotiation; and (2) only after she joined Teachscape did
 13 it seek a relationship with Marygrove so as to offer, on more favorable terms, the exact
 14 same MAT degrees that Canter were offering. *See Compl. ¶ 13, 15, 16, 20 & 21*. Canter's
 15 factual allegation must be taken as true, and if Teachscape wishes to rebut this assertion by
 16 showing that, somehow, its executive or other employees or contractors with knowledge of
 17 the confidential specifics of Canter's relationship with Marygrove in no way assisted and
 18 did not otherwise warn Teachscape that its acts would interfere with an existing contract,
 19 then Teachscape cannot use a motion to dismiss to present this counterview.

20 **2. Teachscape avoids facts pled in moving to dismiss for lack thereof.**

21 Teachscape's characterization of Canter's claims as stemming from "a decision not
 22 to renew" by Marygrove misstates the Complaint's allegations. *See Mot.*, at 22:24-23:4.
 23 The Complaint alleges that the agreement with Marygrove regarding the CIA degrees was
 24 disrupted by Teachscape "during the contract's term," and that Marygrove failed to give an
 25 offer of first refusal to Canter when the contract entitled Canter to such an offer. *See*
 26 *Compl. ¶¶ 16, 17 & 51-54*. The Court should ignore Teachscape's argument in this respect,
 27 including its citation to an inapposite unpublished and non-citable opinion (*see* 9th Cir. R.
 28 36-3(c) & N.D. Cal. Civ. L.R. 3-4(e)) holding that where a contract has already expired, the

1 proper cause of action for disruption of a renewal agreement is interference with
 2 prospective contract. *See Pacific Oxygen Sales Co. v. Union Carbide Corp.*, No. 89-16366,
 3 1991 WL 42150, at *2 (9th Cir. Mar. 21, 1991).

4 **3. At least one prospective economic relationship has been pled.**

5 Canter's claim regarding prospective economic relationship requires an additional
 6 allegation that Teachscape's interference was wrongful beyond the interference itself.
 7 *Reid-Ashman Mfg. v. Swanson Semiconductor Serv., L.L.C.*, No. 06-4693, 2007 WL
 8 1394427, at *11-*12 (N.D. Cal. May 10, 2007); *see also Korea Supply*, 29 Cal. 4th at 1158.
 9 In addition to pleading that Teachscape has interfered with its other relationships in offering
 10 graduate level degree programs and courses, Canter has met this requirement by alleging
 11 that Teachscape, by using confidential information about the Marygrove agreement
 12 obtained from Ms. Jaivin and possibly other employees, not only caused Marygrove to
 13 abruptly withdraw from negotiations regarding the Reading degree, but also did not offer
 14 Canter the first refusal right it was due. *See* Compl. ¶¶ 15-16. Canter specifically points to
 15 Teachscape's use of the confidential terms of the Marygrove contract to "negotiate with
 16 Marygrove on more favorable terms." *Id.* ¶ 15. In addition, an independently actionable
 17 misdeed, such as Teachscape's misuse of Canter's trade secrets as part of Teachscape's
 18 negotiations with Marygrove, satisfies the requirement of an additional allegation of
 19 wrongdoing. *See Korea Supply*, 29 Cal. 4th at 1159; *Reid-Ashman*, 2007 WL 1394427,
 20 at *12.

21 Teachscape's argument that this claim is inadequately pled ignores and
 22 mischaracterizes the very cases it relies upon. Teachscape relies upon *Silicon Knights, Inc.*
 23 v. *Crystal Dynamics, Inc.*, 983 F. Supp. 1303 (N.D. Cal. 1997), but in that case, the plaintiff
 24 made "no allegations . . . from which the court or defendants could infer the probable
 25 disruption of an actual economic relationship." *Id.* at 1312. Here, Canter has pled
 26 disruption of the Marygrove relationship, specifically regarding the Reading degree that was
 27 already the subject of negotiations and a contract clause between Marygrove and Canter.
 28 *See* Compl. ¶ 16. Teachscape more egregiously misstates the law in citing *Tele Atlas N.V.*

1 *v. Navteq Corp.*, 397 F. Supp. 2d 1184 (N.D. Cal. 2005). Rather than supporting its
 2 position, this case affirms that Canter's allegations are sufficient, holding “[c]ourts often
 3 require a plaintiff to identify *at least one* such ‘third party’ to state a claim.” *Id.* at 1194
 4 (emphasis added). Again, Canter has identified (and described in detail) the disruption of
 5 its longstanding relationship with Marygrove, and this is sufficient at the pleading stage.

6 **4. Canter has pled that damages have been sustained.**

7 Teachscape's argument that Canter has failed to plead damages lacks any merit
 8 because Canter has pled that Marygrove's breach of its contract with Canter was due to
 9 Teachscape's interference, which resulted in damage to Canter. Unlike in *Silicon Knights*,
 10 the only case that Teachscape cites in support, Canter has alleged the factual predicate of
 11 actual disruption of its relationship with Marygrove. *Compare* Compl. ¶ 16 with *Silicon*
 12 *Knights*, 983 F. Supp. at 1310. Moreover, Canter has further alleged that its “economic
 13 relationship with such clients and prospective clients were actually disrupted as a result of
 14 Teachscape's wrongful acts” and that the conduct “impinge[d] upon Canter and its business,
 15 reduce[d] its profits” and caused it to suffer harm. Compl. ¶ 43 & 47. Again, these factual
 16 allegations must be taken as true, and they show that Canter's interference claims are
 17 plausible. Indeed, Teachscape's Motion does not really contest the adequacy of these
 18 allegations. Instead, it tries to refute them by arguing without any support from the
 19 Complaint or otherwise that “Canter did not (and based on its announced intention to
 20 provide online degree programs *exclusively through its subsidiary university* cannot in good
 21 faith) claim . . . damages.” Mot., at 23:9-14 (emphasis added). This tack is not appropriate
 22 for a motion to dismiss for failure to state a claim. *See Twombly*, 127 S. Ct. at 1965 (“all
 23 the [factual] allegations in the complaint are true (even if doubtful in fact)”).

24 **C. Canter's Claims For False Advertising Are Adequately Pled.**

25 **1. Teachscape applies an incorrect, heightened standard of pleading.**

26 The word “update” would often not be misleading, especially if used truthfully.
 27 However, in the context of offering a “Masters in the Art of Teaching with a Focus in
 28 Curriculum, Instruction and Assessment” at Marygrove, when such a degree had only ever

1 been offered at Marygrove by Canter in the past, by labeling the program with the exact
 2 same name as “updated” in advertising it, the use of this word is both untrue and highly
 3 likely to lead to consumer (school teacher) confusion. Regarding its claims of false
 4 advertising, Canter “need only plead that the statement is false or that consumers find it
 5 misleading.” *Cytosport, Inc. v. Nature’s Best, Inc.*, No. 06-1799, 2007 WL 1345379, at *1
 6 (E.D. Cal. May 8, 2007). Teachscape’s argument to the contrary notwithstanding, this
 7 Court has twice stated that there is no heightened pleading requirement for Lanham Act
 8 claims; rather, the same “short, plain statement” will suffice, and Lanham Act claims do
 9 “not require the plaintiff to set forth specific allegations or evidentiary facts.” *Sigma*
 10 *Dynamics, Inc. v. E.Piphany, Inc.*, No. 04-0569, 2004 WL 2533220, *4 (N.D. Cal. Nov. 8,
 11 2004) (citing *Summit Tech., Inc. v. High-Land Med. Insts. Co.*, 933 F. Supp. 918, 937 (C.D.
 12 Cal. 1996)); *see also Mintel*, 2007 WL 2288329, at *9 (“[Defendants] provide no persuasive
 13 authority for their claim that this cause of action [for false advertising under the Lanham
 14 Act] is subject to a heightened pleading standard.”). In raising the same panoply of
 15 arguments as to Canter’s Section 17500 claim, Teachscape again improperly relies on state
 16 court cases that do not apply the notice pleading standard. *See* Mot., at 15:20-16:17. For
 17 the Section 17500 claim, the Court should employ the same notice pleading standard as for
 18 the parallel false advertising claim under the Lanham Act. *See, e.g., Pinnacle Sys., Inc. v.*
 19 *XOS Techs., Inc.*, No. 02-3804, 2003 WL 21397845, at *5-*6 (N.D. Cal. May 19, 2003)
 20 (analyzing sufficiency of pleading of Lanham Act & Section 17500 claims together); *cf.*
 21 *Denbicare U.S.A. Inc. v. Toys “R” Us, Inc.*, 84 F.3d 1143, 1152 (9th Cir. 1996) (finding
 22 Lanham Act and Section 17500 false advertising claims rise and fall together).

23 Canter in this case has pled specific facts relating to its Lanham Act and Section
 24 17500 false advertising claims as to Teachscape’s promotion in September 2006 of its
 25 program offering, through Marygrove, by naming it a MAT degree with a focus on CIA and
 26 advertising it as “updated,” even though it never previously offered such a degree or focus
 27 whereas Canter had. *See* Compl. ¶¶ 17-19. Canter need not prove that the advertisement or
 28 the word “updated” in Teachscape’s advertisement is absolutely false in order to prevail; it

1 need only show that that the word was misleading when used as Teachscape used it.
 2 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1140 (9th Cir. 1997). Like in
 3 *Sigma*, the Complaint “explicitly states the alleged false statements at issue, who made
 4 them, and when they were made.” *Sigma*, 2004 WL 2533220 at *4. Further, these facts
 5 show that Teachscape’s advertisements were likely to confuse teachers, by falsely implying
 6 that Teachscape’s MAT degree in CIA program was a continuation of, or affiliated with,
 7 Canter’s MAT degree in CIA program. *Cf. Mintel*, 2007 WL 2288329, at *8 (finding as
 8 sufficient the allegation that “the misrepresentations deceive the public because they create
 9 a false impression that [defendant] is selling [plaintiff’s] products and offering technical
 10 support with [plaintiff’s] permission, when in fact [plaintiff] long since terminated its
 11 relationship with [defendant].”) In light of the facts pled, Teachscape is left to argue
 12 (without legal support) that Canter should attach an example of Teachscape’s own
 13 misleading advertisement to the Complaint. *See Mot.*, at 13:8-13. Given the notice already
 14 provided, this is unnecessary.

15 **2. Teachscape’s advertisement is a false comparison, not puffery.**

16 Desperate to avoid liability, Teachscape argues that its advertisement is true in fact
 17 and is a vague and outrageous statement that amounts to puffery, even though these
 18 arguments are inconsistent. *See Mot.*, at 13:8-14:18 & 15:27-15:15. Teachscape also
 19 throws in an argument that the statement was not material, because it is unlikely to
 20 influence the purchasing decision. *See id.* at 14:14-18. None of these should persuade the
 21 Court because they really seek to undermine Canter’s factual allegations, which must be
 22 taken as true. *See Twombly*, 127 S. Ct. at 1965 (“all the [factual] allegations in the
 23 complaint are true (even if doubtful in fact”). Here, Canter has alleged that:

24 Teachscape engaged in advertising to the public its offering of “updated”
 25 courses through Marygrove. Thereafter and through the present, Teachscape
 26 has described its new relationship with Marygrove in an untrue or misleading
 27 way for the purpose of misleading the public to believe that it has a long and
 28 successful track record in offering these programs through Marygrove, when
 in fact it does not.

Compl. ¶ 65; *see also id.* ¶ 19 (“By marketing a degree . . . as ‘updated,’ Teachscape’s

1 advertising was untrue and misleading and likely to deceive the public in that it implied that
 2 Teachscape's courses were updates or improvements of courses previously offered at
 3 Marygrove."). Teachscape's counterpoint that its own advertisement was in reference to
 4 "Marygrove's degree programs" is better left to decide upon evidence of whether
 5 Teachscape's promotion of its MAT program in CIA as "updated" was understood by
 6 teachers as the same as Canter's offering through Marygrove, or instead understood it to
 7 mean different from Canter's offering. Similarly, given the sufficiency of the allegations in
 8 the Complaint in providing notice to Teachscape, presentation of evidence as to whether its
 9 advertisement and its use of the term "updated" influenced the teachers' decision to
 10 purchase should be left for another day. Finally, Teachscape's argument that Canter must
 11 ultimately prove that it is probable that the statement will deceive is beside the point—at
 12 this stage, Canter has set forth enough facts to show that these false advertising claims,
 13 including deception by consumers, are plausible.

14 Moreover, calling its CIA program "updated" is not on its face puffery that
 15 consumers would readily discount, such as calling its course "#1" or "the best." Rather,
 16 Teachscape's statement intentionally obscures the source of the program, as alleged by
 17 Canter. Unlike the cases regarding puffery that Teachscape cites, when a defendant makes
 18 false statements suggesting it is selling products from a source other than itself, this is
 19 actionable false advertising. *See Mintel*, 2007 WL 2288329 at *7-*9 (holding that plaintiff
 20 has stated a claim for false advertising claim when complaint states that defendant's website
 21 states that it sells plaintiff's products, when in fact it does not).

22 Teachscape's reliance on *Williams v. Gerber Products Co.*, 439 F. Supp. 2d 1112
 23 (S.D. Cal. 2006) is misplaced. The court in *Williams* focused on the overall context of the
 24 allegedly misleading statements. *Id.* at 1117 (holding that the words "all natural" were not
 25 misleading when taken in context). Teachscape also mischaracterizes *In re Century 21-RE/MAX Real Estate Advertising Claims Litigation*, 882 F. Supp. 915 (C.D. Cal. 1994),
 26 where the court actually differentiated between puffery—i.e., advertisement stating
 27 defendant had "beaten the odds and become #1"—from comparisons with a competitor—as
 28

1 is the case here—finding that “alleg[ing] falsities regarding average sales per agent” would
 2 have enabled the Plaintiffs in that case to bring a Lanham Act claim based on an
 3 advertisement stating that a competitor’s agents outsold the competition “3 to 1.” *Id.* at 923
 4 & 927.

5 **D. Laureate and Canter Have Properly Asserted A Claim For Unfair
 6 Competition Pursuant To Section 17200, And Properly Seek Restitution
 For Teachscape’s Unfair Competition.**

7 Teachscape’s argument to dismiss Laureate’s and Canter’s unfair competition claim
 8 fails because this argument is premised on the success of its other arguments. Teachscape
 9 correctly asserts that, per *Cel-Tech Communications, Inc. v. Los Angeles Cellular
 Telephone Co.*, 20 Cal. 4th 163 (1999), Laureate and Canter, being competitors of
 10 Teachscape, must allege “conduct that threatens an incipient violation of an antitrust law, or
 11 violates the policy or spirit of one of those laws because its effects are comparable to or *the
 12 same as a violation of the law*” to state a claim under Section 17200. *Id.* at 187 (emphasis
 13 added). However, Teachscape then swings for the fences by asserting that because
 14 Laureate’s and Canter’s other claims fail, no violation has been asserted. *See* Mot., at 24:1-
 15 5. As demonstrated above, Laureate and Canter claims (including Canter’s Section 17500
 16 claim which is specific violation of Section 17200) are adequately pled and thus
 17 Teachscape’s basis for moving to dismiss the Section 17200 claim fails. Moreover,
 18 Teachscape’s knowing use of Canter’s confidential information and methods in the hands of
 19 its former employees and inducement of breaches of Canter’s agreements with its former
 20 employees to maintain the confidentiality of that information also constitute violations of
 21 policies established in the California Civil Code (e.g., §§ 1549 *et seq.*) and California Labor
 22 Code (e.g., §§ 2860 & 2870). *See* Compl. ¶¶ 23 & 72.

24 Likewise, Teachscape’s argument that restitution is unavailable to Laureate and
 25 Canter should be rejected. Teachscape argues that *Korea Supply* limits restitutionary relief
 26 under Section 17200 only to the return of money that was once in Laureate’s and Canter’s
 27 possession. *See* Mot., at 24:13-20. However, as noted in *Korea Supply* and its progeny, a
 28 defendant’s profits are not immune from recovery *per se* because “restitution is broad

1 enough to allow a plaintiff to recover money or property in which he or she has a vested
 2 interest.” *Korea Supply*, 29 Cal. 4th at 1149; *Juarez v. Arcadia Fin., Ltd.*, 152 Cal. App. 4th
 3 889, 915 (2007) (“the plaintiffs arguably have an ownership interest in any profits Arcadia
 4 may have gained through interest or earnings on the plaintiffs’ money that Arcadia
 5 wrongfully held.”). In this case, Laureate and Canter have alleged numerous violations of
 6 law by Teachscape that also constitute unfair competition so as to displace Laureate and
 7 Canter from their receipt of profits from long-established relationships with Canter’s
 8 partners, such as Marygrove, and with ongoing expectancies per the contracts with their
 9 partners. *See* Compl. ¶¶ 9, 11, 15-16, 19, 21 & 73-74. Thus, unlike money sought by
 10 plaintiff in *Korea Supply* that was a contingent expectancy of payment from a third party
 11 from a potential contract, here existing contracts afforded Laureate and Canter
 12 non-contingent and identifiable profits, which were taken away by Teachscape through its
 13 unfair and improper means of using Canter’s existing business relationships. Put in another
 14 way, Teachscape’s improper methods in entering the market for master’s degree and
 15 graduate course program guaranteed it profits—the profits to which Laureate and Canter
 16 were entitled through their existing contracts.

17 **CONCLUSION**

18 For the reasons stated above, the Court should deny Teachscape’s motion to dismiss.

19 Dated: August 28, 2007

Respectfully submitted,

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21 By _____ /s/ DANIEL N. KASSABIAN
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 23 CANTER AND ASSOCIATES, LLC and
 LAUREATE EDUCATION, INC.

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